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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	) Byproduct Material License
	) No. 34-19089-01
ADVANCED MEDICAL SYSTEMS, INC.	) Docket No. 30-16055-~~CP~~ CIVP
	) EA-85-60
	) ASLP No. 89-592-02-CivP
	) (Civil Penalty: Overexposure)

ADVANCED MEDICAL SYSTEMS, INC.'S BRIEF
IN OPPOSITION TO NRC STAFF MOTION FOR SUMMARY DISPOSITION
AND FOR DECISION SUSTAINING ORDER

I. INTRODUCTION

AMS respectfully moves that the Atomic Safety and Licensing Board ("ASLB") deny the NRC Staff's Motion for Summary Disposition of the enforcement proceeding and provide a hearing on the merits of the NRC's decision to enforce a civil penalty of Six Thousand Two Hundred and Fifty Dollars ($6,250.00) against AMS. In support of this Motion, AMS has provided below sufficient argument as to the requirements placed on an administrative agency before summary disposition may be granted. In addition, AMS has provided arguments that are sufficient to show that there are genuine issues of material fact in dispute, despite the unsubstantiated arguments of the NRC that none such exist.

II. BACKGROUND

This proceeding arises from events that happened in November, 1984. Corrective action was taken prior to an NRC inspection as indicated in AMS' letters of January 24, 1985; March 8, 1985; March 27, 1985; and April 17, 1985. Thereafter, the NRC conducted an inspection which included the interrogation of AMS employees, without benefit of counsel or cross-examination by AMS' counsel. A report and Notice of Violation was issued dated June 28, 1985. AMS filed a timely response on July 31, 1985 which was supplemented May 24, 1988. On April 8, 1988, AMS employee Howard Irwin and AMS were indicted in Federal District Court for allegations arising from the NRC investigation. The Federal District Court dismissed the indictments on July 11, 1988. Thereafter, on May 30, 1989, close to five (5) years after the events,

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the NRC issued an order imposing civil penalties. AMS filed a timely request for hearing on June 20, 1989.

III. FACTS

A. Operation at the London Road Facility

When AMS was formed, the London Road facility was staffed by experienced workers who had previously been employed there by Picker International.

The actual assembly of Cobalt 60 sources is done in a small 6' x 6' cell which is enclosed with concrete-shielded walls and a small window. See Exhibit A. A technician stands outside the cell and assembles a source by looking through the window and using mechanical hands to remotely assemble the sources inside the cell. There is a door at the back of the cell which can be opened.

Employees wear pocket dosimeters and film badges to measure the amount of radiation to which they are exposed. The film badges are sent to a testing laboratory for analysis on a monthly basis. The lab sends AMS a monthly report concerning the level of radiation recorded on each film badge. This information is compared with the dosimeter readings. Based on the lab reports, the AMS Radiation Safety Officer prepares NRC Form-5's on a quarterly basis to keep a running total of the employees' accumulated lifetime exposure to radiation and to calculate the unused lifetime exposure.

B. Form-4 Background

Because the NRC limits the amount of exposure of radiation to which an employee may be exposed in his lifetime, NRC licensees (employers) are required to ascertain a new employee's history of exposure during previous employment. The Form-4 is used to record this information. Form-4's are not required for employees who are not expected to be exposed to more than 1.25 rems of radiation in a calendar quarter. The forms are kept on file by the employers and are available for NRC inspections. They are not sent to the NRC.

From time to time, it was necessary for workers at the Geneva plant to assist workers at the Cleveland facility. In these situations, workers would be asked to volunteer. If it was unlikely that the volunteer workers would be exposed to more than 1.25 rems of radiation, no Form-4's were required. Howard Irwin, however, specifically made a practice of asking all AMS employees involved in any work at London Road what their previous radiation exposure was. NRC Staff Attachment 7 at 21.

C. Individual A's Background

Individual A, a draftsman at the AMS Geneva Plant, was one of the workers who volunteered to work at the London Road facility in 1984. He was hired by AMS in 1983 when he was eighteen, after a brief period of employment with a grocery store. Prior to that, he had worked for AMS the Summer of 1982 on a part-time basis.

Individual A was exposed to measurable radiation in September and November of 1984. The possibility of the alleged overexposure was not detected until the erroneous film badge reports were received from the lab in January of 1985.

Individual A left AMS in 1986 to become a fireman in Madison, Ohio.

D. Responsibilities of the AMS Radiation Safety Officer

From 1981 until May of 1984, Norman F. Kelbley, an experienced Picker employee, served as the AMS Radiation Safety Officer (RSO). It was his responsibility to prepare Form-4's for new employees and update exposure histories on Form-5's. He was also responsible for keeping AMS in compliance with all other NRC regulations.

Mr. Kelbley left AMS in April of 1984 to return to Picker International. From May of 1984 until November of 1984, Glenn Sibert, another veteran Picker employee, served as acting RSO. As longtime Picker employees with many years of experience and assigned responsibility for hot cell operations, either Norm Kelbley, Glenn Sibert or Tony Santoro, who worked under Mr. Sibert, would have completed a Form-4 for Individual A as part of standard working procedures.

Howard Irwin was appointed RSO in November of 1984. It was shortly after Mr. Irwin's appointment that Individual A again performed work at London Road. Mr. Irwin, however, was not at London Road when the work was done. Glenn Sibert, who was performing the RSO duties, supervised the work and directed the activities of the individuals involved.

The possibility of the alleged overexposure was not detected until the erroneous film badge reports were received in January of 1985 by Mr. Irwin, at which time he investigated the situation and issued a written notification to the NRC.

E. Circumstances Surrounding the Signing of the January, 1985 Form-4

In January of 1985, Mr. Irwin received film badge reports for November of 1984. The reports erroneously indicated that Individual A had been exposed to more than 3 rems during the fourth quarter of 1984.

After notifying Individual A of the suspected overexposure, Mr. Irwin, unable to locate Individual A's Form-4, prepared another Form-4 based on his direct knowledge that Individual A had come to AMS shortly after completing high school and that Individual A's previous work experience was in a grocery store where he would not have had previous exposure. He dated the Form-4 September 12, 1984 and Individual A signed it.

He then investigated the matter and prepared a notification letter to the NRC concerning the suspected overexposure and the remedial action that had been taken. An NRC investigation was later conducted.

When NRC investigator Toye Simmons interviewed Individual A, she learned that another Form-4 had been signed in January of 1985. Mr. Irwin confirmed this fact when he was interviewed and explained the circumstances. Based on the fact that Mr. Irwin was fully aware that Individual A's records would have been thoroughly reviewed by NRC representatives in earlier inspections, Mr. Irwin completed an additional Form-4 merely to replace the information that was missing from the file.

When the incorrect film badge results were rechecked by the lab, it was revealed that Individual A's exposure was, in fact, less then 3 rems during the final quarter of 1984. On April 8, 1988, Howard Irwin and AMS were indicted for allegations concerning this Form-4. On July 11, 1988, the Federal District Court dismissed the indictments.

F. NRC Inspection History

The results of NRC's July 16 and 17, 1984 inspection conducted by James R. Mullauer and Toye S. Simmons provide:

"7. Personal Radiation Protection - External

External radiation exposure is monitored by film badges supplied by Radiation Detection Company. Whole body badges are processed on a weekly basis and wrist badges are processed once a month. All personnel involved in the fabrication, exchange or loading of sources wear pocket dosimeters as well as film badges.

Past exposure histories (Form NRC-4) have been prepared and are updated quarterly for all personnel involved in the source fabrication, exchange and loading program. Therefore, personnel exposures for this period were within the limits specified in 10 CFR 20.101(b)." (emphasis added)

The results of NRC's special unannounced inspection on September 11, 12, 24, and 25, 1984 to review six (6) allegations concerning licensee operations and radiation safety procedures found no items of non-compliance.

Individual A was among those interviewed at that time due to his alleged overexposure.

The NRC report stated:

"4. Inspection Finding

a. The allegation concerning an overexposure to Individual A was not substantiated.

Individual A, a full-time employee since September 1983, usually worked at the Geneva Plant. On occasion, he has assisted at the London Road facility. Individual A stated that he had assisted at London Road facility on only four (4) occasions: April 5, 1984; May 17, 1984; June 1, 1984; and on September 11, 1984. He performed the following tasks under the direct supervision of authorized personnel:

1. Assisted in preparing radioactive waste for disposal.
2. Assisted in scrubbing down the isotope laboratory and portions of the waste storage area.
3. Assisted in cleaning a shipping cask for return to the cobalt supplier.

4. Assisted in the removal of a shipping cask containing bulk cobalt from delivery truck.

Each time Individual A has been assigned to the London Road facility, he was monitored with whole body and extremity film badges. These external radiation monitors which are supplied by Radiation Detection Company were processed monthly. Individual A's exposure results were as follows (see Attachment A results):

	Whole Body (mrem)	Extremity (mrem)
April	0	15
May	0	0
June	0	0

On three (3) occasions, a dosimeter was also used with the following results:

	Dosimeter Reading
April 5, 1984	20 mR
May 17, 1984	40 mR
June 3, 1984	10 mR

On September 11, 1984, the first day of this inspection, Individual A was assigned to the London Road facility. He was observed wearing a whole body film badge and he had an extremity film badge in his possession.

Individual A stated that he had no reason to believe he had received an overexposure. Through further discussion with the alleger, it was learned that the alleged overexposure was based on a 40 mR dosimeter reading.

No items of non-compliance were identified."

In light of the fact that this inspection was the consequence of an alleged overexposure to Individual A, Inspector Simmons would have had to review Individual A's Form-5 in order to properly investigate the allegation and reach the conclusion she reached.

G. Cell Surveys

As indicated in NRC Staff Attachment 8, Mr. Glenn Sibert had over a decade of experience working with the Picker/AMS hot cell facility, having begun his career as a Picker Isotope Engineer in February, 1971. See NRC Staff Attachment 8, pp. 2-3. Mr. Sibert was responsible for cell decontamination and surveys prior to entries. Preparation for a cell entry began several days in advance. See NRC Staff Attachment 8 at 25. Mr. Sibert scanned the cell with a Victoreen 500 electrometer with remote probe, located any stray Cobalt 60 pellets and removed them. Id. Once

decontamination was completed, Mr. Sibert took other surveys including air samples and a survey around the hot cell door which, in his expert opinion, had the highest level of radiation in the cell. Id. at 25-29; 47-48. This was especially important since the cell entrance was the location where the hot cell workers stood and worked when the hot cell door was opened. Id. at 47. It remained Mr. Sibert's opinion that adequate surveys were performed and, despite the NRC's allegations, no evidence was ever presented to demonstrate that Mr. Sibert's results would have been different had he done his surveys any differently. Id. at 60-62; 65-66. This is particularly true since although there were areas of the cell over the plugs that may have had higher readings, the individuals pushing the cask into the cell were not instructed to go inside the cell. They were to remain at the door area and push the cask in from that point. The small size of the cell and the large size of the cask would prevent them from entering the cell much beyond the door. In addition, the cask itself would be positioned over the plug and would provide shielding. Id. at 66.

H. Cell Openings and Dosimeter Readings

Glenn Sibert oversaw and was in charge of the cell entries on November 6 and 21, 1984. As discussed by Mr. Sibert in NRC Staff Attachment 8, the hot cell door was opened one time on November 6, 1984 and two jobs were conducted by Individuals A and B. Id. at 41. Each individual made one entry to perform his assigned task. Id. at 40-41. During this period, they were timed by Ms. Josephine Powell. Id., at 36-37; 71-72. Tony Santoro was also present.

One individual stayed in 1.75 minutes, the other 1.1 minutes. Mr. Sibert presumed that the dosimeters were probably read after one minute. Id. at 44. Mr. Sibert did not consider their final dosimeter readings of 790mR and 750mR to be unusual. Id. at 45.

On November 21, 1984, the hot cell was opened two times, Id. p. 51, once in the morning to push the cask containing the Cobalt-60 into the hot cell, and once in the afternoon to pull the cask out of the hot cell. Id. at 52. On that day, Individuals

A and B made one entry each in the morning and one entry each in the afternoon. Id. at 52, 70. The one minute dosimeter checks were requested by Josephine Powell through the P.A. system. However, only the final dosimeter readings of 1625 for Individual A and 1600 for Individual B were recorded. Id. at 50-51. Mr. Sibert specifically recalled asking them what their interim dosimeter readings were and being told 160mR. Id. at 50-51.

Mr. Sibert defined the completion of a cell entry as occurring when the cell door was closed. Id. at 53, 55. These entries were properly recorded on ISP-18 forms. See NRC Staff Attachment 1, Inspection Report, Attachments B and C. It was standard procedure to read dosimeters during the work period, and Individuals A and B were instructed to read them. NRC Staff Attachment 8 at 71. Josephine Powell let them know when to check their dosimeters. Id. at 36-37. According to Mr. Sibert, they were, in fact, read by Individuals A and B. Id. at 71. Dosimeters were never read inside the hot cell because it would expose the individual to unnecessary radiation. Id. at 74-75. Instead, they were read in the decontamination area behind the open hot cell door. When the cell door was open, the decontamination room and hot cell essentially became one big room.

It remained Mr. Sibert's expert opinion that dosimeters were read at correct intervals and before re-entry into the hot cell, and that the individuals would have been prompted by Ms. Powell to read them had they forgotten to do so.

I. Calibration of Dosimeters

As discussed in NRC Attachment 7, the standard practice for calibration of dosimeters was to compare the dosimeter readings with film badge readings. See NRC Staff Attachment 7 at 37. This practice modified a 1979 procedure which was found to be unworkable because it yielded a 25% discrepancy. See NRC Staff Attachment 8 at 67-69. The procedure had been in place prior to Mr. Irwin assuming the responsibility of RSO and had never previously been considered improper or inadequate by NRC inspectors during prior inspections. See NRC Staff Attachment 7 at 37. The

NRC has never been able to produce any evidence that the dosimeters were not in calibration or that the method of calibration used in November, 1984 was not adequate.

IV. DISCUSSION

As set forth in Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 435 (1984):

> The proponent of a motion for summary disposition has the burden of demonstrating the absence of a genuine issue of material fact. It does not necessarily follow, therefore, that a motion supported by affidavits will automatically prevail over an opposition not supported by affidavits. In that situation, the Board must nevertheless scrutinize the motion to determine whether the movant's burden has been met. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 156-61 (1970); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

The proper standard to be applied is found in Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59 (1983): "Even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact." Id., 17 NRC at 62 citing Cleveland Electric Illuminating Co., 6 NRC at 753-54.

The record and affidavits supporting and opposing the motion must be viewed in the light most favorable to the party opposing the motion. Public Service Co. of New Hampshire et. al. (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877 (1974); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982). The opposing party need not show that it would prevail on the issues but only that there are genuine issues to be tried. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-12, 23 NRC 414, 418 (1986).

As discussed by the Board in General Electric Co. (G.E. Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530 (1982), "in order to grant a motion for summary disposition, the record before us must demonstrate clearly that there is no possibility that there exists a litigable issue of fact." Id., 15 NRC at 532. "In short, prior to granting summary disposition, [the Board] must be convinced that

there are no significant outstanding unresolved questions material to the particular issue under review." Pennsylvania Power & Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337, 338 (1981).

The fact that the party opposing summary disposition fails to submit evidence controverting the disposition does not mean that the motion should be granted. The proponent of the motion must still meet his burden of proof to establish the absence of a genuine issue of material fact. Cleveland Electric, 6 NRC at 753-54; Pennsylvania Power & Light, 13 NRC at 337; Carolina Power and Light Co., 22 NRC at 208; Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 310 (1985); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 633 (1986). Thus, even if no party opposes a motion for summary disposition, the movant's filings must still establish the absence of a genuine issue of material fact. Cleveland Electric, 6 NRC at 753-54.

As discussed by the Board in Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3 17 NRC 59 (1983):

> [S]taff's conclusion is not buttressed by supporting facts and reasons and does not negate the existence of a genuine issue of fact. Even at trial, were we to accept such unsupported staff statements we would be abrogating our responsibility as judges and substituting the staff's judgment for our own. On ultimate issues of fact, we must see the evidence from which to reach our own independent conclusions.

Id., 17 NRC at 62 (footnote omitted).

Thus, summary procedures should be used sparingly in litigation where motive and intent play leading roles. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). In discussing Federal Rule 56, the Poller Court found that it authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,....[and where] no genuine issue remains for trial....[for] the purpose of the rule is not to cut litigants off from their right of trial if they really have issues to try." Poller,

368 U.S. 468 (quoting Sartor v. Arkansas National Gas Corp., 321 U.S. 620, reh'd denied, 322 U.S. 767 (1944)).

The Poller court took note of the fact that the Plaintiff had no opportunity to cross-examine a key witness in the case, Id., 368 U.S. at 470, and concluded:

> We look at the record on summary judgment in the light most favorable to... the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Poller, 368 U.S. at 473 (footnote omitted). Here, all interrogations were conducted in the absence of AMS' counsel. As such, AMS has had no opportunity for cross-examination.

The Supreme Court went on to state: "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." Id. Summary disposition is, thus, not a method of shifting the burden of proof on one or more issue to the party opposing the motion. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1974).

Whether or not AMS will eventually prevail on the merits is not a determining factor when considering a Motion for Summary Disposition. All that is relevant is whether there is a single material fact in dispute based on which AMS could obtain relief. As demonstrated by the NRC Staff's own supporting documentation, numerous material facts remain in dispute.

A Licensing Board has utilized the clear and convincing evidence standard with regard to findings concerning the falsification and manipulation of test results by a licensee's personnel because such findings could result in serious injuries to the reputations of the individuals involved. See Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671 (1987). There, the Board believed that a more stringent evidentiary standard was justified where, as here, the events in question allegedly occurred seven or eight years before the hearing

and the witnesses' memories had faded. Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification, 25 NRC at 690-91. The Board stated: "In a case like this, where an issue depends on strained and faded memories, it would be unfair to find a person guilty of dishonest or fraudulent conduct on a mere preponderance of the evidence, which can mean only that the record underlying a finding makes it slightly more likely than not." Id., 25 NRC at 690. The Board chose the clear and convincing evidence standard because findings such as manipulation and falsification are likely to have strong impact on one's reputation. Here, NRC's accusations also have strong reputational impacts and the events surrounding the allegations of improper conduct occurred some six (6) years ago.

As will be set forth below, contrary to the arguments made by the NRC, the testimony of the four (4) individuals does not support the NRC allegations set forth in Items A-D of the June 28, 1985 Notice of Violation and Proposed Imposition of Civil Penalties. Even had the events occurred as alleged, a review of the transcripts fails to support Severity Level III violations.

In its brief, the NRC set out the four alleged violations of NRC regulations and license conditions by AMS. NRC attached voluminous transcripts to its brief, but these very transcripts prove that there are material facts in dispute. Each of the alleged violations, A-D, will be addressed in turn.

With respect to Item A, the NRC brief states:

> "An AMS employee received a whole body dose of 2.9 rems in the fourth quarter of 1984. This dose exceeds the 10 CFR Section 20.101(a) limit of one and one quarter rem per calendar quarter. Conditions provided in 10 CFR Section 20.101(b) which permit a greater occupational dose are not applicable in this situation."

The NRC Staff feels that 10 CFR Section 20.101(b) does not apply. However, the NRC Staff has failed to note 10 CFR Section 20.102(a) which states:

> "(a) Each licensee shall require any individual, prior to first entry of the individual into the licensee's restricted area during each employment or work assignment under such circumstances that the individual will receive or is likely to receive in any period of one calendar quarter an occupational does in excess of 25 percent of the applicable standards specified in Section 20.101(a) and Section 20.104(a), to disclose in a

> written, signed statement, either: (1) That the individual had no prior occupational dose during the current calendar quarter, or (2) the nature and amount of any occupational dose which the individual may have received during that specifically identified current calendar quarter from the sources of radiation possessed or controlled by other persons. Each licensee shall maintain records of such statements until the Commission authorizes their disposition."

The key concept here are the words "will receive or is likely to receive." The time that Individuals A and B were to be in the hot cell was not likely to have placed them anywhere near the allowable 1.25 rem amount even if they stayed for 2 and 1/2 minutes at 500mR, which they did not, as shown by the testimony of Glenn Sibert who had been working at the London Road Facility since 1971, NRC Exhibit 8 at 38, and was responsible for cell surveys and entries. Id. at 70. Consider, for example, his testimony in NRC Exhibit 8, page 31:

> "Q. Let's say 18R for argument's sake, let's say anything under 20. What is the maximum number of minutes you would let someone stay in there providing they could read their dosimeters and were getting good data. What would be the most you would let somebody pick up for a quarter?
>
> A. For a quarter?
>
> Q. Because what I'm trying to do is simulate two new people with no background, single entry, two entries --
>
> A. As far as individuals going into the cell, it has been past practice that the majority of the people when they go into the cell, they usually wind up picking up 5-, 6-, 700mR,....You tell people when you go in there if you run into any type of problem, don't stand there and think about it. Get out behind the door...."

Note that there was every expectation that the individuals would receive less than 1.25 rems, below the amount where a Form-4 is needed. In addition, Howard Irwin had the information required by the Form-4 which showed that the individual could exceed the 1.25 rem per quarter limit as is shown by NRC Staff Attachment 7 at 13.

> "Q. You made a statement, and it is documented in the letter: 'The information required on form NRC 4 was determined and was available before the cell entries.' Who made the determination?
>
> A. I knew the information.
>
> Q. When you say the information was available, was it collected in one form in one location, or I mean obviously some of the information -- you knew his name, you knew his social security number --

A. I had all the information except his signature.

Q. You had all that information?

A. Yes.

Q. Where did you obtain it?

A. I obtained it from him, from prior work that he has done for us.

Q. At what time did you obtain that? How did you become aware of his previous occupational exposure, where he worked and what he had received?

A. In speaking with him earlier in the year."

Mr. Irwin goes o[illegible]te on Page 21 of the NRC Staff Attachment 7:

"A. Routi[illegible]the individual whether or not he's ever worked in a facility [illegible] exposed him to radiation, and in all cases that I've had, they all said no.

Q. You do that for all your employees or - notice you have two plants, and like in _____ _____'s case, he's a draftsman, _____ _____ is not what I would call a regular radiation worker --

A. Yes."

With respect to Item B, the NRC brief states:

"On November 6 and 21, 1984, inadequate surveys at the door of the hot cell at the AMS facility were made. This failure to adequately survey a high radiation area violates 10 CFR Section 20.201(b)."

The NRC is wrong when it says the survey was not adequate. Consider the fact that the following testimony was given on Pages 24-25 of the NRC Staff Attachment 8 by Glenn Sibert:

"Q. Would you, for the record, walk us more or less through a cell entry?

A. Cell entry? All right. Prior to going in, you got to have your film badge, wrist badge. Prior to going into the cell, we always picked and checked the cell for stray pellets, because the way they were buying the cobalt, it comes in a canister; and when you cut it open, it flies in every direction. We had to spend at least two or three days scanning for pellets every time we went in.

Q. How was this done?

A. With the probe, a Victoreen 500 meter. We would scan through using manipulators. Scan for them. Get the level down as low as we could get it at that point by using that, check for hot spots. They actually made me a tool in Geneva that was a mop handle with a piece of thread rod on it with some wires trying to check the floor for pellets.

Q. Using the manipulator arm?

A. Right, using manipulators. So we go ahead and do that. Bring that up on the tabletop, then pick the pellets off with the other magnet we had. After we get the pan of cobalt, we bring the floor plug up, put the cobalt in the vault capsule, put the plug back into the storage, close it up, scan some more. We get it as low as we could get it with that meter. Then the next procedure was to get ready to go in."

The testimony of Mr. Sibert at Page 28 of NRC Staff Attachment 8 goes on to give additional information as to the adequacy of the survey.

"Q. Another reading for air contamination?

A. No, that's the radiation level. That's not for airborne contamination. This is the second reading we're going to take. Now we're worried about what the radiation level is in the cell. Open up the door, stick the meter in there, see what the reading is. Anything under 20R, we could proceed. Anything over 20, close the door up, go back out and forget it.

Start checking again for stray pellets, which the lathe we had back in there had a lot of pellets. I worked on that for a day and a half trying to get the pellets out of it. Maybe we pick up some more pellets we didn't find the first time. Okay, put those pellets away back down the floor plug. Take another air sample.

Q. This was just a process which was repeated and repeated?

A. Until you could make your cell entry. After we made the air sample prior to going into it, we also had to have an air sample for during cell time. So we're on the second air sample now to see how much airborne you kicked up while you were in there. Then if you opened up the door again, stick your meter in there, and your level was within limits, then you could proceed to open up your door."

The NRC Staff has never given any basis as to why these procedures were considered inadequate. Their bald statement that the procedure was inadequate does not make it an undisputed material fact. Further, to continue using the NRC's own documents to show that this is a material fact in dispute, consider the testimony from Pages 60-63 of NRC Staff Attachment 8.

"MR. SRENIAWSKI: I think the "I" refers to Dr. Stein.

BY MR. WALKER:

Q. Dr. Stein says, 'I don't understand how the NRC inspector could have reached such an erroneous conclusion that such a survey was not made. The RSO designate specifically stated in front of four witnesses that the NRC inspector was informed that such a survey was made.' Now, I want to know if you made such a statement in front of four witnesses; and if so, how does that correspond with the fact that you didn't see Toye very often?

A. Surveys were made and I don't know what he's talking about here.

Q. Forget about the surveys for a minute. I want to see if what he's corroborating here is true or not. Did you -- I don't want to have to restate it again. You know what the question is. Did you do that in front of four witnesses; and if so, who were the witnesses?

A. I would have no idea who the witnesses were because when Toye was there, normally Toye talked to us in private.

Q. Did you verify this to Dr. Stein in front of four witnesses?

A. Pertaining to what he's talking about right here, I haven't talked to Dr. Stein.

Q. If, in fact, you were the person who is being referred to as the RSO designate, then you cannot corroborate that this, in fact, occurred.

A. I would tell you, and I would tell Toye, and I would tell Dr. Stein that I did take the surveys and I in no way --

Q. I'm not contesting that --

A. I would not tell Toye I did not take the surveys.

Q. I'm not even talking about that point. I want to know where he's coming up with the information. He's supporting this by making an allegation or insinuation that you stated this emphatically in front of four witnesses, and I want to know yes or no?

A. The statement would have to be made at London Road. It could be Josephine Powell, could be Tony, Howard Irwin --

Q. Do you recall having made such a statement specifically -- having it brought to your attention by Dr. Stein or somebody and making such a statement.

A. Dr. Stein has never personally asked me one way or the other pertaining to this here.

Q. Has Josephine Powell asked you specifically?

A. No.

Q. Has Howard Irwin?

A. Howard knows the surveys were taken."

Continuing on Page 65:

"Q. We wanted to get as specific here as best you can recollect, because I don't want to place any significance that this may be false in any manner.

A. No. As far as I'm concerned, any time that the cell was entered, a survey was made, and I will go down dying on that...."

Continuing further down Page 65:

> "A. The surveys we were taking--they bought a new probe for the Victoreen 500 probe. We used that and our levels were lower up closer to the window than back by the back, which will be the front, the first opening when you walk into the cell."

It is interesting to note at this point that the NRC investigator did not seem interested in whether or not a survey had been made, rather he was interested in whether Mr. Sibert had made the statement in front of four people which is really of no importance with respect to the charge made by the NRC. Either the investigator had poor investigative techniques or he was looking for any facts in addition to the charges already stated which he might be able to use against AMS. However, if there is any doubt as to those material issues regarding the adequacy of the survey, consider the NRC Staff Attachment 8 at Page 70:

> "A. I am sure that the surveys were adequate.
>
> Q. Was that your responsibility to assure that at the time?
>
> A. That was my responsibility."

To continue on Page 73:

> "Q. Do you feel the use of a survey meter at the door is a more accurate reading than that obtained by the use of a local probe, having the experience and knowledge of the facility?
>
> A. I find the radiation meter is more accurate than the probe. I changed the probe. I've got the probe inserted in tygon tubing to keep it from getting contaminated so we can pull it out and have it recalibrated at the next interval."

Glenn Sibert went on to testify at Pages 47-48 of NRC Staff Attachment 8 as follows:

> "A. See, the problem over there as far as taking surveys, the surveys have always been taken at the cell door because that appeared to be the hottest spot because we have a lathe mounted to the cell door. The lathe--when they cut open capsules, pellets fall down inside the chuck or the gear box and everything else. That appeared to be the hot spot of the cell.
>
> Q. I wasn't aware of that.
>
> A. That's where we would determine what the stay time really is by the initial entrance into the cell, by taking a survey at the door when the door was open. Arm level over, maybe from here to the table, and that's where you take your reading.

BY MR. WALKER:

Q. Your experience in the past at this facility has proven that this is the hottest spot?

A. Yes."

He went on to state:

"...another thing you have to keep in mind, when you go into the cell to put the cask in there, you don't go inside. You're where the door closes up against the tabletop because you've got this 6-7000 pound container in front of you that you're pushing in."

Id. at 66.

Thus, the procedure used by AMS, if anything, was more accurate than other procedures and was, therefore, a more than adequate survey. It must be noted that Mr. Sreniawski, the NRC Radiation Specialist, did not even know of the hot spot by the door. Had the NRC investigated the technical nature of the problem before beginning legal proceedings, perhaps they would have recognized that the survey was adequate and would not have found themselves in a position where they could not back down without losing face.

The testimony of Individuals A and B adds further credence to the fact a survey was made. AMS emphatically states that the surveys were adequate, and even viewed in the light most favorable to NRC, it still remains a question of material fact. Consider the following testimony of Individual A from NRC Attachment 6 at Page 13-14:

"Q. Okay, prior to entry, did you take any readings?

A. I didn't. Glenn Sibert did. He took an air sample through a passageway into the cell. He took one air sample, and he also took a reading when he opened the door, the hot cell door.

Q. So he took an air sample in the cell?

A. Right.

Q. How do you do that, just reach in?

A. No. What he did--it is a long copper tube with an air filter on the one end, and we put it through a hole in the cell that we use to put the source capsules and things through, like a pass box I guess you would call it, and we hooked it up to an air pump, like, and it just draws in air for

a certain time and then you pull it out and we wrap it up and do a count in the well counter. And then I believe they take the reading from the count and plug it into the computer and that, I believe that's how they get our stay time, the approximate stay time and the amount of radiation that--airborne contamination in a cell.

Q. That's one reading. The next reading?

A. The next reading, Glenn took a meter and just as he opened the door, he sort of stuck the meter around the opening and took a reading that way.

Q. I know that this was most intent on your mind as to the readings. Do you recall if there was any problem regarding the extent of radiation in the hot cell at the time?

A. No. I don't remember any.

Q. Nothing out of the ordinary?

A. I don't remember anything."

The testimony of Individual B contained in NRC Staff Attachment 9 at Pages 8-9 confirms that a survey was made.

"Q. Would you just describe to us the procedures and process which you went through in order to enter the hot cell and, I guess, the testing of the radiation levels inside the hot cell? What was your understanding of what was going on?

A. Okay, with the manipulators, Glenn would take the probe and scan around for any scattered pellets or anything. We have an overall general idea of the radiation level and you could find any hot spots, clean the hot spots up, and after the hot spots are clean, then--I don't recall the levels that existed after all the hot spots were cleaned, but after Glenn felt that they were low enough, we'd take an air sample for the stay time for airborne contamination."

With respect to Item C, the NRC brief states:

"On November 21, 1984, two AMS employees failed to read their dosimeters at intervals consistent with the anticipated dose rate. The failure to read dosimeters while working in a high radiation area violates Condition 16 of the AMS license which references the AMS 'Radiation Safety Procedures Manual, ISP-1' dated July, 1983, Section 7.2c."

As set forth by Mr. Sibert in NRC Staff Attachment 8, two entries were made on November 21, 1984:

"Q. How many entrances were made into the cell in that time frame, November 21, 1984?

A. Two entrances. * * *

A. They would take the cobalt cask into the cell, then take the cask out of the cell. * * *

A. Push the container in, unload it and pull it out of the cell. Just really two. * * *

Q. And you were there?

A. I was there.

Q. And you were an eye witness?

A. Yes."

Id. at 52-53.

Further, the testimony contained in the NRC Staff Attachments shows that the AMS employees did read their dosimeters at least at intervals consistent with the anticipated dose rate and that it was the policy of AMS to have the employees so read their dosimeters. On Page 30 of NRC Staff Attachment 8, Glenn Sibert testified as follows:

"Q. You mentioned that the 20R per hour was your entry level. Did you have another level--I calculate that to be 333MR per minute. Did you have a working level which you wouldn't let someone receive any higher exposure, 1 rem, 2 rem; how far up would you let someone go?

A. I would not let anybody go up there. I tried to maintain and tried to get people to read their dosimeters and everything else. I felt that the less they could get, the better it was for them. The better it was for anybody else involved in it...."

Certainly, the material fact in question at this time is what was meant by "intervals consistent with the anticipated dose rate". It is apparent that the NRC Staff doesn't think a rate of almost once a minute is an interval consistent with an anticipated dose rate of from 500 to 700 rems. The evidence shows that the anticipated stay time was 2 and 1/2 minutes but the actual time in the hot cell was much shorter, probably on the order of a minute, as shown by the testimony of Individual A at NRC Staff Attachment 6, Page 21:

"Q. How long did you say was your longest time period to remain in the cell? Give us an idea of the time frames which we're talking about.

A. Oh, geez, seemed like forever in there. Probably the longest would be two minutes, at the most. Just judging.

Q. Just judging, two minutes inside?

A. Let me rephrase that. Two minutes inside the decontamination room, which probably would have been maybe a minute inside the hot cell."

As previously shown, the anticipated dose would not be more than 500 to 700 rems. The testimony of Mr. Glenn Sibert in NRC Staff Attachment 8 at Pages 35-36 is as follows:

"Q. The point I'm trying to find out is: When that survey was made and you were the one that made it, you estimated an approximate--or by feeding that data into the computer, you got an approximate exposure time?

A. No, stay time, not exposure.

Q. Then you got stay time?

A. Stay time is from the computer; right.

Q. That was 2 and 1/2 minutes?

A. Yes.

Q. And that time was the time that was given to Josephine Powell, and she entered that on the timer?

A. Well, what we do--the timer goes on when the individual walks into the cell. When the individual walks out, the timer is shut off. He goes back in, the time starts up again. That way, we can determine the amount of stay time in the cell, how much time was actually spent in the cell, because the individual may walk back by the decon room doors and stand there for three or four minutes."

Further on in his testimony at NRC Staff Attachment 8, Pages 50-51, he stated:

"Q. Do you know if on either event, the 6th or the 21st, they checked their dosimeters at the one-minute time interval.

A. I recall asking them what they picked up, and--

Q. That would be--

A. I asked Individual A and Individual B and it seems to me, like they told me, that they picked up 160MR.

Q. Okay, that doesn't jive with the--doesn't coincide with the information that they recorded. They got about 845MR dosimeter reading.

A. Yes. Is that for the 21st?

Q. Yes, we're on the 21st. That's the date.

A. Well, 845 is their final dosimeter reading.

Q. Okay, that was at the--at the end of how may entries was that?

A. That would be--their final dosimeter reading would be at the end of that work time. Now see, what had to be done that day, the container had to be put into the cell. I have to go out of the cell, or out of the lab, take a shower, get dressed, come back out of the cell window to get ready to unload this container. While I'm getting it unloaded, these two are in the lab out of the high radiation area. They are out of the--over by the view window where you can look into the lab, and they have to wait until I get that container unloaded before we make preparations to take the container out of the cell.

Q. Okay, so you remember them making how many dosimeter checks during those intervals?

A. I know one, 160, is what they told me they picked up, and that's about all I can remember."

If they had been in the hot cell for about 2 and 1/2 minutes (from the testimony, they were probably in only a little over a minute) and took at least one reading during that time, then the rate was about once a minute. Further, Mr. Sibert testified under oath that they read the dosimeters during their stay and after they left which is certainly sufficient to raise a question as to the material fact as to whether the dosimeters were read at an "interval consistent with the anticipated dose rate." It should also be noted that the investigator, rather than trying to get information, was attempting to "trip up" Glenn Sibert as to whether the dosimeters were read or not during the stay in the hot cell. Mr. Sibert said that the individuals quoted an amount to him, i.e., 160mR, and it was for this reason that he said the dosimeters were read which they certainly were or he would not have been given an amount. Page 72 of NRC Staff Attachment 8:

"Q. Did these individuals that were working there read their dosimeters at the times indicated prior to entry and at times within the work period?

A. <u>The dosimeters were read</u>.

Q. Earlier, you indicated that you don't recall seeing them read these dosimeters during the work period. Are you assuming they did?

A. <u>They did read them</u>. You got to read them through a plastic bag.

Q. Earlier in the interview, you indicated that you don't recall having seen them do this. You just--

A. No, I didn't see them. Like I said, I am not aware--I can't be a mother hen to them. Otherwise--I can't watch every move they make, because during the course of cobalt being put away, I'm in and out.

Q. You're assuming that they are doing as they were instructed?

A. They were instructed to read their dosimeters. The time was specified with the use of a stopwatch, so we know when they have to check their dosimeters.

Q. And further, these times were monitored by Ms. Powell?

A. Ms. Powell."

From the above, it is obvious that either the interviewer didn't understand the difference between receiving an oral confirmation that the dosimeters had been read and actually seeing them being read. This could lead one very quickly to the conclusion that the interviewer was more interested in finding a violation than in getting to the truth. Regardless, this does present a question of material fact which can only be resolved through testimony and cross-examination.

With respect to Item D, the NRC brief states:

> "The dosimeters used by the two individuals who worked in the hot cell on November 6 and 21, 1984, had not been calibrated for more than 180 days. This failure to calibrate dosimeters violates the AMS License Condition 16 which references Section E of the AMS application which states that dosimeters will be calibrated at intervals of 180 days or less or before first use, if longer than 180 days since last calibration."

While the NRC may argue that the procedure used by AMS was not acceptable to NRC Staff and AMS vehemently denies that they were improper, for the Staff to say the "dosimeters used...had not been calibrated for more than 180 days" is pure rubbish. Consider the testimony of Glenn Sibert in NRC Staff Attachment 8 at Pages 67-68:

> "Q. The last item, if you'll look at Mr. Stein's response to us dated 7/31/85. It is the briefest one, it should be easy. In it, he is discussing how dosimeters are calibrated, pocket dosimeters. He lists the fact that the procedure was found unworkable, and the technique adopted as an alternative was a comparison of dosimeters with film badge reports on a monthly basis. Did you do that comparison?
>
> A. Howard Irwin--what they did is purchased some new dosimeters. Howard tried to set them up with our Cobalt 60 standard that we have, and come to find out they were--<u>the brand new ones were 25 percent off the way it calibrated. He took it on his own to calibrate these</u>. I was not part of

it. I normally carry a dosimeter. I know what I pick up on my dosimeter. I record it, I get the film badge report from Radiation Detection in California, I verify my dosimeter readings with theirs. My dosimeter had been running pretty close to the readings that they were giving us. If, for some reason or other, I found a discrepancy in the dosimeter readings to theirs, I would get another dosimeter and carry 2 dosimeters, and then find out which one was what. I also brought--I mean, I've discussed this with AMS time and time again about Radiation Detection. I did not and I do not--"

Evidently the dosimeters were calibrated since Mr. Sibert stated that Howard Irwin "took it on his own to calibrate these". In his testimony, Mr. Irwin confirms this:

"Q. Are you the one that does that calibration or did that calibration?

A. That was a standard practice from prior to my assuming responsibility of SO and it is being carried through.

Q. Do you consider that a calibration in the true sense of the word?

A. I consider it as accurate as a calibration, yes."

NRC Staff Attachment 7 at 37.

Once again, while NRC Staff may dispute whether the calibrations were acceptable, there is testimony that calibrations were performed. This is thus a material fact in dispute, especially since no evidence was ever presented to show that this calibration method, which had never been questioned during previous inspections, was neither not accurate nor not acceptable.

Unfortunately, the NRC is attempting to and gets away with the twisting of words because they are not challenged. However, in matters where the NRC makes statements of facts and then says there is no dispute even though there is contrary testimony, AMS will not sit still and witness this travesty on the legal justice system.

Thus, as set forth above, the NRC's own evidence fails to establish any Severity Level III violations. Further, the NRC has failed to establish the absence of material litigable issues of fact. General Electric Co., 15 NRC at 532. Carolina Power and Light, 19 NRC at 435, Cleveland Electric Illuminating Co., 17 NRC at 62. Thus, their Motion for Summary Disposition must be denied.

V. STATEMENT OF MATERIAL FACTS WHICH ARE IN DISPUTE

1. The NRC Staff erred in considering the alleged four violations to be collectively at a Severity Level III. Even if the alleged violations did occur and AMS vehemently denies that there were violations, they should not be classified at Severity Level III due to the fact that they do not meet any of the conditions of Severity Level III either collectively or singularly. Even if AMS were to admit all the allegations, the severity level would be, at most, Level IV, not Level III.

In his affidavit, James Lieberman admits that none of the single violations were of Severity Level III but that he reached Severity Level III due to the collective violations. Since the agency admits it was the judgment of their Director of the Office of Enforcement and not that their was, per se, a Severity Level III violation, there is an obvious dispute as to a material fact. The basis of Mr. Lieberman's judgment certainly raises a question of material fact.

2. 10 CFR Part 2, Appendix C, which was in effect at the time the civil penalty was imposed, provides:

B. Civil Penalty

* * *

2. Corrective Action to Prevent Recurrence.

Recognizing that corrective action is always required to meet regulatory requirements, the promptness and extent to which the licensee takes corrective action, including actions to prevent recurrence, may result in up to a 50% increase or decrease in the base civil penalty shown in Table 1. For example, very extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. In weighi g this factor, consideration will be given to, among other things, the timeliness of the corrective action, degree of licensee initiative, and comprehensiveness of the corrective action--such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

* * *

G. Exercise of Discretion

Because the NRC wants to encourage and support licensee initiative for self-identification and correction of problems, NRC may exercise discretion as follows:

* * *

2. The NRC may refrain from issuing a notice of violation or a proposed civil penalty for violations described in an inspection report or official field notes that meet all of the following criteria:

a. (i) The NRC has taken significant enforcement action based upon a major safety event contributing to an extended shutdown of an operating reactor or a material licensee (or a work stoppage at a construction site), or the licensee is forced into an extended shutdown or work stoppage related to generally poor performance over a long period; (ii) the licensee has developed and is aggressively implementing during the shutdown a comprehensive program for problem identification and correction; and (iii) NRC concurrence is needed by the licensee prior to restart;

b. Non-willful violations are identified by the licensee as the result of its comprehensive program, or as a result of an employee allegation to the licensee. If NRC identifies the violation, the NRC should determine whether enforcement action is necessary to achieve remedial action;

c. The violations are based upon activities of the licensee prior to the events leading to the shutdown; and

d. The violations would normally not be categorized as higher than Severity Level III violations under the NRC's Enforcement Policy.

3. The NRC may refrain from proposing a civil penalty for a Severity Level III violation not involving an overexposure or release of radioactive material that meets all of the following criteria:

a. It was identified by the licensee and reported;

b. Comprehensive corrective action has been taken or is well underway within a reasonable time following identification;

c. It was not a violation that either (i) was reasonably preventable by the licensee's action in response to a previous regulatory concern identified within the past two years of the inspection or since the last two inspections, whichever is longer, or (ii) reasonably should have been corrected prior to the violation because the licensee had prior notice of the problem involved; and

d. It was not a willful violation or indicative of a breakdown in management controls. (emphasis added)

As such, even if the violations were properly Level III violations, James Lieberman's statement that the imposition of the fine as being in accordance with 10 CFR Part 2, Appendix C, J. Lieberman Affidavit, Paragraph 2, is a material fact in dispute.

3. The NRC has failed to establish that a Form-4 for Individual A was not completed prior to September, 1984 by another AMS employee. Moreover, the NRC has failed to repute the facts that Mr. Howard Irwin had all the information necessary with the exception of Individual A's signature on another document, and that this

information was available on his employment application. Thus, this remains a material fact in dispute.

4. Even assuming arguendo that no Form-4 existed in September, 1984, there remains a material fact in dispute as to whether it was proven necessary since 10 CFR Section 20.102(a) only requires one if an individual is expected to receive greater than 1.25mR. As set forth by the NRC's own evidence, it is undisputed that Individual A's exposure was expected to be less than 1.25mR.

5. The NRC has presented undisputed evidence that all necessary surveys were performed by Mr. Glenn Sibert in accordance with NRC regulations and AMS policy. The NRC has failed, however, to present any documentation whatsoever to demonstrate that Mr. Sibert could have done anything to have decreased the exposure time for the two individuals. As such, the NRC's bold, unsupported conclusion that the surveys taken by Mr. Sibert were not adequate remains a material fact in dispute.

6. James Lieberman never claimed that the actions taken in the hot cell were of Severity Level III. Whether they are of any severity level is a material fact in dispute. Surveys are by their very nature random. No one performs a survey by testing every inch of a hot cell, so even the most thorough survey could leave an area in the hot cell that was of a higher than desirable rem count. If this occurred and the person who entered the hot cell was exposed to this one particular high area, the counts on that individual would be higher.

Unfortunately, the English language is not as precise as is mathematics. Even with full instruction as to what areas of the hot cell to work in and what areas to avoid, a misinterpretation of the instruction may place an individual in an area where he should not be and hence the radiation exposure would be higher than predicted. As discussed by Mr. Sibert in NRC Attachment 8, one of the several surveys he took was specifically at the cell door because years of experience with this hot cell had always proved that was where the highest level of radiation was and that is where the individuals stood and worked when they entered the hot cell.

Thus, the adequacy of the cell survey taken inside the door area remains a material fact in dispute.

7. The issue of whether dosimeters were read remains in dispute because Mr. Sibert, the individual in charge of the hot cell entries and the man with the greatest years of experience in the hot cell, has presented testimony that they were read prior to, during and at the completion of cell entries. A reading of Individual A's and B's testimony demonstrates that dosimeters were read by them at proper time intervals. What further remains in dispute is whether the NRC's insistence that dosimeters should be read while the individual was still inside the hot cell violates ALARA principles and created an unnecessary health and safety risk. As such, even assuming arguendo that one of the individuals failed to read his dosimeter during one of the interval trips, this incident does not rise to a Severity Level III violation.

8. The issue of the definition of a cell entry remains a material fact in dispute since the individual with the greatest experience, Glenn Sibert, considered a cell entry to be the opening and closing of the cell door.

9. Regarding the calibration of dosimeters, with respect to Item D of the NRC Staff Motion for Summary Disposition, while the fact that an alternative method was used may not be in dispute due to what is contained in AMS's license, the severity level certainly is, especially in light of the fact that the enhanced procedure had been in place during previous inspections. Since the alternate method protected the health and safety of the workers who entered the hot cell, a Severity Level III is much too high and this is, thus, a significant material fact in dispute especially since there is no evidence to show that the dosimeters were out of calibration.

10. From the NRC's own documentation, it is evident that the goal of the NRC investigators was not to investigate the matter - they had already formed conclusions that they were trying to support - but to harass AMS employees, Irwin Transcript,

NRC Attachment 7 at 31, 38-39. Thus, the facts contained in the Order are all in dispute.

11. The issue whether the NRC inspectors were adequately trained to conduct a proper inspection remains a material fact in dispute.

VI. CONCLUSION

For the reasons stated above along with the evidence contained in the NRC Staff Motion and the requirements contained in 10 CFR, the ASLB should deny the NRC's Motion for Summary Disposition of the Enforcement Proceeding. AMS has provided arguments that are more than sufficient to show that there are genuine issues of material fact in dispute. Due to the fact that Summary Disposition is not the appropriate administrative action to take, AMS respectfully requests that the ASLB provide a hearing on the merits of the NRC's decision to enforce a civil penalty of Six Thousand Two Hundred and Fifty Dollars ($6,250.00) against AMS years after the events occurred, especially since all areas in question were self-corrected by AMS before the initial NRC inspection.

Respectfully submitted,

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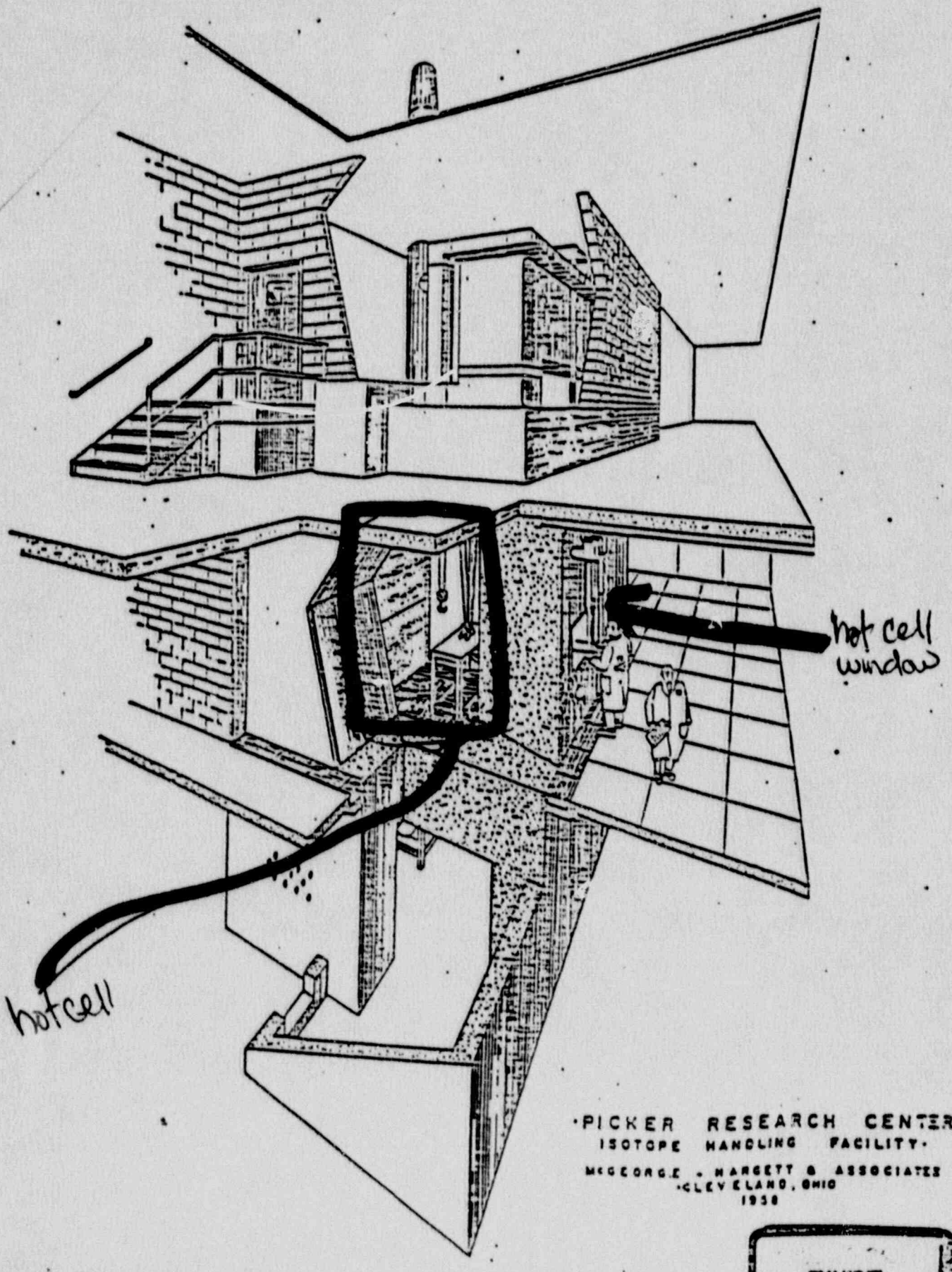

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·CLEVELAND, OHIO
1958

EXHIBIT
A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Byproduct Material License
	)	No. 34-19089-01
ADVANCED MEDICAL SYSTEMS, INC.	)	Docket No. 30-16055-CP
	)	EA-86-60
	)	ASLBP No. 89-592-02-CivP
	)	(Civil Penalty: Overexposure)

CERTIFICATE OF SERVICE

I hereby certify that copies of "AMS' Brief in Opposition to Motion for Summary Staff Disposition and For Decision Sustaining Order" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 4th day of October, 1990:

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